

No. 05-1338

**IN THE
SUPREME COURT OF THE STATE OF GRACE**

KIT POLITTE AND CORY TOWLES,
Petitioners,

v.

**HORTON HOPKINS SCHOOL DISTRICT
AND KEENA SMALLS,**
Respondents.

**On Writ of Certiorari to the
Court of Appeals of the State of Grace**

BRIEF FOR RESPONDENT

**Team 18
ATTORNEYS FOR RESPONDENT**

QUESTIONS PRESENTED

1. WHETHER Respondents' attempt to regulate Petitioners' Internet speech created off-campus was a violation of Petitioners' First Amendment rights.
2. WHETHER Respondents' warrantless search of Petitioner Towles on school premises violated Towles' Fourth Amendment rights, as applied to school officials by the Fourteenth Amendment.

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CONSTITUTIONAL PROVISIONS OR STATUTES INVOLVED

U.S. Const. amend. I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. XIV, § 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

I. Factual Background

On September 10, 2008, Kit Politte, a senior at Horton Hopkins High School, created a network webpage entitled “Fighting All Dealers (FAD),” which called for community members to submit information about potential drug dealers. (R. at 2) Politte works on the website from her home, and posts the strongest tips. Id. at 2, 3. On September 15, 2008, Politte promoted the FAD webpage at an on-campus, after-school meeting of Drug Use Damages Schools (DUDS), a school-sponsored club. Id.

On October 4, 2009, Politte received an e-mail attachment containing a photograph of Cory Towles, a Horton Hopkins sophomore, sitting with two other sophomores, Frank Conrad and John Thomson, at a party hosted by student Jeff Tweegs the night before. (R. at 3) Conrad was smoking in the photo. Id. The party had been broken up by police, who had cited several students for underage drinking, and who also cited sophomore Frank Conrad for marijuana possession. Id. Politte posted the photograph on the FAD webpage, along with a caption reading, “Police find drug use at local high school party. Are Horton Hopkins students becoming drug dealers?” Id.

On October 5, 2008, Keena Smalls, Principal of Horton Hopkins High School, received several phone calls from concerned school parents who had viewed Politte’s webpage. (R. at 3) The local police also contacted Smalls and told her about the citations given at Tweegs’ party. Id. After viewing the FAD webpage and photograph, Smalls questioned Towles, Conrad, Thomson, and Tweegs individually in her office. Id. After all four student denied possessing drugs, Smalls searched their lockers and book bags, and found marijuana in Conrad’s locker. Id.

Smalls then asked each student to submit to a search of their persons. (R. at 3) Despite their refusals, the gym teacher, Mr. Jim Waters, conducted a search of each boy in a private room. Id. Waters had each student strip to his undergarments and at no time touched the students. Id. After searching the clothing, Waters found more marijuana in Thomson's jeans pocket. Id.

In response to Politte's FAD webpage and the school's search, Towles created his own Friendkikipedia webpage called "Students Against Defamatory Statements (SADS)." (R. at 3) On his SADS webpage, Towles posted, "We need to fight this injustice. I call for all Horton Hopkins students to let our school administrators know we will not tolerate this kind of treatment." Id. at 4. Once Horton Hopkins students became aware of Towles' webpage, they began to access both Towles' and Politte's webpages from the school's computer labs and library both during and after school hours to such an extent that Principal Smalls became concerned with "keeping discipline and order at school, and preventing what she saw as a potential for student protest." Id. Principal Smalls felt that the websites "were causing too much of a disturbance and interrupting other high school students' education." Id. Consequently, Principal Smalls demanded that both students shut down their webpages. Upon their refusal to do so, Principal Smalls suspended Politte and Towles until they agreed to comply with the demand to shut down their webpages.

II. Procedural Posture

Plaintiffs Kit Politte and Cory Towles filed suit against Defendants Keena Smalls and Horton Hopkins School District in The Badger County District Court, claiming that the school district's decision to regulate Politte's and Towles' webpages violated their rights under the First Amendment to the United States Constitution. Towles further challenged school officials'

search of his person under the Fourth Amendment to the United States Constitution. The district court granted the Defendants' motion for summary judgment, holding that the regulation of the Plaintiffs' webpages was constitutional under Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969), and that school officials' search of Plaintiff Towles was constitutional because it met the Fourth Amendment's requirement of reasonableness under New Jersey v. T.L.O., 469 U.S. 325 (1985).

Politte and Towles appealed to the State of Grace Court of Appeals, which affirmed the district court's order granting summary judgment to the defendants. The court of appeals affirmed the district court's ruling that school officials constitutionally regulated the students' webpages under Tinker, overruled the district court's holding that the search of Appellant Towles was constitutional, but held that the school officials were entitled to qualified immunity with respect to the Fourth Amendment claim.

Towles and Politte petitioned successfully for a writ of certiorari to this Court.

SUMMARY OF THE ARGUMENT

The Supreme Court has not yet ruled on the question of whether or not public school officials may regulate students' off-campus, online speech. However, it held in Tinker that school officials may prohibit on-campus student expression that would cause "material and substantial interference with schoolwork or discipline," or "might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities." Tinker thus emphasizes school work and discipline over student expression when student speech jeopardizes the school environment.

Because off-campus student speech, and particularly online off-campus student speech, frequently causes, or poses the reasonably foreseeable risk of, the same types of damage to the

school environment as does on-campus student expression, the ability Tinker bestows upon school administrators to regulate on-campus student speech should apply with equal force to off-campus, online student speech. Under the Tinker standard as applied to off-campus student expression, Respondents did not violate Petitioners' First Amendment rights when they regulated Petitioners' webpages because Petitioners' webpages both substantially disrupted, and presented a reasonably foreseeable risk of substantially disrupting, the work and discipline of Horton Hopkins High School.

In addition, Horton Hopkins school officials conducted a reasonable search of Towles as set forth in the Fourth Amendment. The search of Towles satisfies the reasonableness test established in T.L.O. First, the search was justified at its inception because the school officials had reasonable suspicion that Towles had engaged in drug activity and possessed drugs. The principal received photographic evidence that Towles was present during drug activity, which was later corroborated by certain parents and the local police. Second, the scope of the search was reasonably related to the circumstances which led to the search itself. The school was committed to confronting its major and immediate drug problem. Also, the officials submitted Towles and three other students to a strip search only after first searching their lockers and book bags and discovering marijuana in one of the lockers. During the actual search, the teacher took measures to minimize the intrusion on the students' privacy interests.

Finally, even if the search of Towles were to be found unreasonable and unconstitutional, Horton Hopkins school officials should be given qualified immunity. The law governing school searches is not clearly established, and consequently does not provide the requisite guidance needed for the reasonable person to discern confidently the reasonableness of the search of

Towles. This Court should recognize that the school officials conducted the search in good faith by providing them with qualified immunity.

ARGUMENT

I. RESPONDENTS' REGULATION OF STUDENTS' INTERNET SPEECH WAS PERMISSIBLE UNDER THE STANDARD ARTICULATED IN TINKER, AND THEREFORE DID NOT VIOLATE PETITIONERS' FIRST AMENDMENT RIGHTS.

The relatively recent and rapid development of the internet poses many novel legal questions. A number of courts, both state and federal, have acknowledged the uncertainty brought about by the fact that the Supreme Court has not yet ruled on a case involving off-campus, online student speech. *See, e.g., Doninger v. Niehoff*, 527 F.3d 41, 48 (2d Cir. 2008) (“The Supreme Court has yet to speak on the scope of a school’s authority to regulate expression that . . . does not occur on school grounds or at a school-sponsored event.”); *J.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847, 863 (Pa. 2002) (lamenting that the United States Supreme Court has not addressed student expression for fifteen years). As a result of this lack of controlling precedent, “when it comes to student cyber-speech, the lower courts are in complete disarray, handing down ad hoc decisions that . . . lack consistent, controlling legal principles.” Kenneth R. Pike, *Locating the Mislaid Gate: Revitalizing Tinker by Repairing Judicial Overgeneralizations of Technologically Enabled Student Speech*, 2008 B.Y.U. L. Rev. 971, 990 (2008).

The instant case provides an opportunity for this Court to concretely answer the question of whether off-campus, online student speech is subject to administrative prohibitions and sanctions under the First Amendment. Respondents urge this Court to adopt the Second Circuit’s application of *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), to off-campus, online student speech and hold that Respondents’ demand that Petitioners take down their webpages, and Respondents’ subsequent suspension of Petitioners

when Petitioners refused to comply with this demand, did not violate Petitioners' First Amendment rights.

A. The Tinker Standard Should Be Applied to Student Internet Speech Because The Same Rationales for Limiting On-Campus Student Speech Pertain to Limiting Off-Campus Student Speech.

1. The circumstances in which Tinker permits sanctions on student speech protect a very compelling government interest: the functioning and discipline of the public schools.

The First Amendment's command that "Congress shall make no law . . . abridging the freedom of speech," U.S. Const. amend. I, is one that this Court takes very seriously. The right to freedom of speech is the embodiment of "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964). It is, however, well established that public school students' First Amendment rights "are not automatically coextensive with the rights of adults in other settings." Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 266 (1988) (internal citations omitted) (holding that school principal could constitutionally censor student newspaper); see also New Jersey v. T.L.O., 469 U.S. 325, 340-42 (1985) (upholding the warrantless search, without probable cause, of a student by a school official under totality of the circumstances standard). The speech of public school students can therefore be regulated in circumstances in which, outside of the school context, regulation would not be constitutionally permissible. See, e.g., Kuhlmeier, 484 U.S. 260; Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1988) (upholding disciplinary action against student whose campaign speech for student office was "indecent" but not "obscene.")

Tinker, which established that public school students [hereinafter, students] have limited First Amendment rights in school, is the foundation of American student speech jurisprudence.

393 U.S. 503 (holding that students' suspension for wearing black armbands to protest the Vietnam War violated the students' First Amendment rights because the students' conduct was pure speech and was not disruptive). Certain categories of student speech, none of which are at issue in the instant case, receive special regulation. See Watts v. United States, 394 U.S. 705 (1969) (governing "true threats"); Fraser, 478 U.S. 675 (governing indecent speech); Kuhlmeier, 484 U.S. 260 (governing school-sponsored speech); Morse v. Frederick, 127 S. Ct. 2618 (2007) (governing speech promoting drug use). All other on-campus student speech is analyzed under Tinker.

Tinker enumerated several situations in which student expression may be constitutionally regulated. Under Tinker, school administrators may prohibit student speech that "would substantially interfere with the work of the school," 303 U.S. at 509, or would cause "material and substantial interference with schoolwork or discipline," id. at 511, or "would materially disrupt the work and discipline of the school," id. at 513, or "might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities," id. at 514. As a baseline, "Tinker held that student expression may not be suppressed unless school officials reasonably conclude that it will 'materially and substantially disrupt the work and discipline of the school.'" Morse, 127 S. Ct. at *7 (quoting Tinker, 393 U.S. at 513).

In order to uphold a regulation which has the effect of limiting free speech, a court generally must weigh the interests in favor of and against the regulation, and find that under the circumstances, the reasons for regulation trump the Constitutionally protected right of free speech. See, e.g., Am. Commc'ns Ass'n v. Douds, 339 U.S. 382, 399 (1950) ("When particular conduct is regulated in the interest of public order, and the regulation results in an indirect, conditional, partial abridgment of speech, the duty of the courts is to determine which of these

two conflicting interests demands the greater protection under the particular circumstances presented.”); Schneider v. State, 308 U.S. 147, 161 (1939) (noting that when evaluating regulations which impinge upon free speech, the Court must “weigh the circumstances and . . . appraise the substantiality of the reasons advanced in support of the regulation”).

The Tinker Court itself stated that “[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.” 393 U.S. at 506. However, weighed against these important, constitutionally protected rights, the Court noted that it had “repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools.” Id. at 507. In holding that student speech may be limited in situations where it threatens, or could reasonably be expected to threaten, the work and discipline of a school, Tinker establishes that although First Amendment protections apply in school situations, the continued functioning and maintenance of order within schools takes priority.

2. The same government interests recognized in Tinker are implicated by student speech which takes place off-campus.

While the Tinker petitioners’ sanctioned conduct took place at their school, in determining whether school officials may prohibit student conduct, Tinker focuses not on where the speech occurs, but on the impact of the student speech upon the school. Indeed, the Tinker Court explicitly acknowledged that “conduct by the student, in class or out of it, which for any reason – whether it stems from time, place, or type of behavior – materially disrupts class work or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech.” Tinker, 393 U.S. at 512-13 (citing Blackwell v. Issaquena County Bd. of Educ., 363 F.2d 749 (5th Cir. 1966)).

Accordingly, as the Second Circuit declared in Doninger, 527 F.3d at 48-49 (quoting Thomas v. Bd. of Educ., Granville Centr. Sch. Dist., 607 F.2d 1043, 1058 n. 13 (2d Cir. 1979) (Newman, J., concurring in the judgment) (finding First Amendment violation in suspension of students for predominantly off-campus, after school publication of satirical newspaper)), “territoriality is not necessarily a useful concept in determining the limit of [school administrators'] authority.” A number of other circuits have also recognized that off-campus conduct can create a foreseeable risk of substantial disruption within a school. See Doe v. Pulaski County Special Sch. Dist., 306 F.3d 616 at 625-27 (8th Cir. 2002) (letter, written and kept at home, threatening the killing of another student); Boucher v. Sch. Bd. of the Dist. of Greenfield, 134 F.3d 821, 827 (7th Cir. 1998) (article published in underground school paper containing information enabling classmates to disrupt the school’s computer system); Sullivan v. Houston Indep. Sch. Dist., 475 F.2d 1071, 1075-77 (5th Cir. 1973) (underground newspaper distributed off-campus but near school grounds).

Although the Second Circuit in Thomas professed that its “willingness to defer to the schoolmaster’s expertise in administering school discipline rests, in large measure, upon the supposition that the arm of authority does not reach beyond the schoolhouse gate,” 607 F.3d at 1044, the same court’s reasoning in Doninger is in stark contrast to the notion that school administrators’ authority is cabined by the physical boundaries of the school. In Doninger, the court upheld the disqualification of a student from running for the position of Senior Class Secretary against a First Amendment challenge because of a publicly accessible blog post the student made at home, after school hours. 527 F.3d at 45. Like the Tinker Court, the Doninger court focused on the impact of the student’s conduct on the school, noting, “We have determined . . . that a student may be disciplined for expressive conduct, even conduct occurring off school

grounds, when this conduct would foreseeably create a risk of substantial disruption within the school environment.” Id. at 48 (internal citations omitted). The Second Circuit pointed out that “Tinker provides that school administrators may prohibit student conduct that will ‘materially and substantially disrupt the work and discipline of the school,’” id. at 50 (citing Tinker, 393 U.S. at 513), and thereby privileges the functioning of the school above disruptive student speech.

The court also correctly remarked that “[i]f Avery had distributed her electronic posting as a handbill on school grounds, this case would fall squarely within the Supreme Court’s precedents recognizing that the nature of a student’s First Amendment rights must be understood in light of the special characteristics of the school environment” – that is, within the limitations established by Tinker and other on-campus student speech cases. Doninger, 527 F.3d at 49. Recognizing the perverse effect of allowing students to undermine school order and discipline as long as they step off of school property, the Second Circuit reasoned that school officials should not be powerless to regulate off-campus student conduct which has the same adverse impact, or potential adverse impact, on school functioning as on-campus student expression. Id.

Applying the Tinker standard to off-campus speech is most consistent with Tinker’s emphasis on the effects, rather than the location, of student expression. Furthermore, Tinker has the advantage of being well-established and notorious caselaw. Because school administrators are already familiar with Tinker, it will not be difficult for them to extrapolate Tinker’s requirements onto off-campus speech. Accordingly, the use of the Tinker standard will enable school officials to easily determine what off-campus student expression they may regulate.

3. Online student speech is more easily disseminated and accessed than traditional forms of speech, and is therefore more likely to reach and affect the school environment.

Doninger presents a much more recent consideration of off-campus speech than does Thomas. Because it addressed the relatively new concerns unique to online communication, Doninger is also far more analogous and relevant to the instant case. The use of the internet renders speech more accessible and makes it easier for a speaker to reach a large, potentially limitless audience. As the United States District Court for the District of Connecticut explained on remand from the Second Circuit in Doninger:

we are not living in the same world that existed in 1979. . . . Today, students are connected to each other through email, instant messaging, blogs, social networking sites, and text messages. An email can be sent to dozens or hundreds of other students by hitting "send." A blog entry posted on a site such as livejournal.com can be instantaneously viewed by students, teachers, and administrators alike. Off-campus speech can become on-campus speech with the click of a mouse.

Doninger v. Niehoff, 2009 U.S. Dist. LEXIS 2704, 17 (D. Conn, Jan. 15, 2009) (mem).

The increased accessibility of speech facilitated by the internet “requires school administrators to be more concerned about speech created off campus – which almost inevitably leaks onto campus – than they would have been in years past.” J.S. v. Blue Mt. Sch. Dist., 2008 WL 4279517, at *7 n.5 (M.D. Pa. Sept. 11, 2008). Because the widespread use of the internet increases the likelihood that off-campus student speech will reach – and have a substantial impact upon – school functioning, school administrators cannot turn a blind eye toward it. The functional distinctions between student speech created on-campus and that created off-campus have been rendered fictitious by the internet, and school administrators must be empowered to protect school functioning from threats created both within and outside of the school setting.

4. Allowing school officials to regulate off-campus student speech does not entail limitless regulation of student speech by school administrators.
 - a. Tinker inherently limits the types of off-campus expression which may be regulated.

This blurring of the boundaries between on and off-campus student speech has engendered a concern that school administrators will be virtually limitless in their ability to regulate and prohibit student speech. However, because the circumstances in which Tinker authorizes regulation of student speech are limited, this fear is groundless. Tinker permits regulation of student speech only in two situations: when the speech actually substantially disrupts school functioning, 393 U.S. at 511, and when administrators reasonably forecast that the speech will have such a disruptive effect ahead of time, 393 U.S. at 514. Extending the Tinker standard to off-campus speech would not allow school officials to regulate all off-campus student speech, any more than they are currently permitted to regulate all on-campus student speech. Applying Tinker to off-campus student speech would simply allow administrators to better protect school functioning by prohibiting student speech regardless of where the speech occurs, but only when it either actually harms, or reasonably foreseeably jeopardizes, school work and discipline. 393 U.S. at 511, 514.

In the event that this Court is concerned about applying Tinker to off-campus speech, despite the fact that it would impact only student speech which has or reasonably risks having a substantial impact on school work or discipline, 393 U.S. at 511, the Court could further limit administrators' ability to regulate by holding that Tinker's limitations on student speech apply only to that off-campus speech which "poses a reasonably foreseeable risk [of coming] to the attention of school authorities." Wisniewski v. Bd. of Educ. of the Weedsport Cent. Sch. Dist.,

494 F.3d 34, 38 (2d Cir. 2007) (upholding student’s suspension for the off-campus transmission of an instant messaging icon suggesting a teacher should be shot).

- b. The risk of impermissible motivation in regulating student speech is mitigated by Tinker’s objective standard for evaluating the actions of school administrators.

A number of courts have acknowledged the fear that school authorities might curtail student speech for illegitimate reasons, such as in order to curry favor with the community or suppress speech with which the administration simply disagrees. For example, the Second Circuit noted that a school official’s

intimate association with the school itself and his understandable desire to preserve institutional decorum give him a vested interest in suppressing controversy. Accordingly, “Under the guise of beneficent concern for the welfare of school children, school authorities, albeit unwittingly, might permit prejudices of the community to prevail.”

Thomas, 607 F.2d at 1051 (citing James v. Bd. of Educ. of Cent. Dist. No. 1, 461 F.2d 566, 575 (2d Cir. 1972); see also Beussink v. Woodland R-IV Sch. Dist., 30 F. Supp. 2d 1175, 1181 (E.D.Mo. 1998) (striking down student’s suspension on the ground that the student’s speech was actually regulated because “he expressed an opinion on the internet which upset” his school administrators). Similarly, Doninger claimed that her school’s officials’ real motivation in suspending her was not the potential for disruption posed by her online speech: “The potential for disruption, Ms. Doninger alleges, was concocted after the fact in order to justify Defendant’s actions.” Doninger v. Niehoff, 2009 U.S. Dist. LEXIS 2704, 10 (D. Conn, Jan. 15, 2009) (mem).

It is, of course, possible that Ms. Niehoff simply objected to being called a “douchebag” on Ms. Doninger’s webpage. However, there is no greater risk of abuse when school administrators prohibit off-campus student speech than when they regulate in the traditional Tinker framework of on-campus student speech. Furthermore, a number of circuit courts have

interpreted Tinker to require that “the concern for disruption, rather than some other, impermissible motive, was the actual reason for” the regulation or punishment imposed. Locurto v. Giuliani, 447 F.3d 159, 179 (2d Cir. 2006); see also Sheppard v. Beerman, 317 F.3d 351, 356 (2d Cir. 2003); ACLU of Florida, Inc. v. Miami-Dade County Sch. Bd., 2009 U.S. App. LEXIS 2253 (11th Cir. 2009) (finding no First Amendment violation in school’s removal of a book from its libraries, because the book was removed for containing factual inaccuracies, not because the board disliked the ideas in the book). This interpretation is rooted in the Tinker Court’s comment that the “testimony of school authorities at trial indicates that it was not fear of disruption that motivated the regulation prohibiting the armbands; the regulation was directed against ‘the principle of the demonstration’ itself.” 393 U.S. at 509 n.3. Should this Court find that Tinker analysis does require courts to inquire as to school officials’ actual motivations in regulating student speech, to the extent that impermissible motivations are discernible to courts, school administrators’ ability to regulate student speech for nefarious purposes would be limited.

Even if this Court holds that Tinker analysis does not involve an inquiry as to the subjective motivations of school officials in regulating student speech, administrators’ ability to regulate student expression is nonetheless cabined. A public school official seeking to regulate or justify the regulation of student speech must establish that the student conduct he or she seeks to regulate either would cause “material and substantial interference with schoolwork or discipline,” Tinker, 393 U.S. at 511, or “might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities,” id. at 514. A court analyzing the regulation of student speech – whether on or off-campus – thus examines whether or not *objective facts* support the administrator’s contention that the prohibited student expression either did substantially and materially interfere with school work and discipline, or

created a foreseeable risk of doing so. Regardless of the administrator's subjective motivation, if he or she cannot establish that the regulation is justifiable under this objective standard, then the regulation is not constitutionally permissible. Accordingly, had Ms. Niehoff been unable to demonstrate either actual disruption, or a reasonable forecasting of disruption, Ms. Doninger's disqualification would not have been constitutional.

Conversely, because Tinker establishes that public school students' behavior which "materially disrupts class work or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech," 393 U.S. at 512-13 (internal citations omitted), if a student's conduct does one of those two things, school officials may prohibit the conduct, regardless of the official's subjective motivations for doing so in any particular case. Furthermore, given the inherent difficulty of ascertaining subjective motivations, and the heavy burden of proving that another person's justification for his actions is pretext, this objective standard may offer students more protection than the subjective motivation inquiry.

B. Respondents' Regulation of Petitioners' Webpages Was Permissible Under Tinker Because The Webpages Substantially Disrupted, and Presented a Reasonably Foreseeable Risk of Substantially Disrupting, The Work and Discipline of Horton Hopkins High School.

1. Petitioners' speech substantially and materially disrupted the work and discipline of Horton Hopkins High School.

Under the prong of the Tinker test which allows regulation of student speech which creates "material and substantial interference with schoolwork or discipline," 503 U.S. at 511, Respondents' attempts to regulate Petitioners' webpages were permissible because Petitioners' webpages did disrupt the functioning of Horton Hopkins High School. At the time that Principal Smalls instructed Petitioners to shut down their webpages, students were "accessing both

Politte's and Towles' pages . . . from the school computer labs and library during their free time throughout the school day." (R. at 4) Principal Smalls demanded that Petitioners take down their webpages because she felt that "Towles' and Politte's websites were causing too much of a disturbance and interrupting other high school students' education." (R. at 4)

The work of a school is the education of its students. Petitioners' speech, though created off-campus, clearly caused "material and substantial interference with schoolwork or discipline," Tinker, 393 U.S. at 511, when it interrupted the education of Horton Hopkins students by creating an on-campus distraction to students during the school day. The significant negative impact of Petitioners' off-campus online speech upon the Horton Hopkins school environment highlights the necessity of school officials being able to regulate student speech which disrupts the school environment, regardless of where the speech is produced.

2. It was reasonably foreseeable that Petitioners' speech would materially disrupt the functioning of Horton Hopkins High School.

Petitioners' webpages were also eligible for regulation on the grounds that they "might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities," 303 U.S. at 514. Under the portion of the Tinker test which allows regulation of student speech on the school administrator's reasonable prediction that the speech will cause disruption, "[t]he question is not whether there has been actual disruption, but whether school officials 'might reasonably portend disruption' from the student expression at issue." Doninger, 527 F.3d at 51 (citing LaVine v. Blaine Sch. Dist., 257 F.3d 981, 989 (9th Cir. 2001)); see also Nuxoll v. Indian Prairie Sch. Dist. # 204, 523 F.3d 668, *5 (7th Cir. 2008). Thus even if no actual disruption of school functioning had occurred, Principal Smalls' demand that Petitioners take down their webpages was permissible because she reasonably predicted that the speech *would* cause substantial disruption to school activities. Tinker, 303 U.S. at 514.

Principal Smalls forecast that Petitioners' webpages could jeopardize "discipline and order at school," (R. at 4) by creating "a potential for student protest." Id. This prediction was entirely reasonable because it was exactly what Petitioner Towles' webpage – which was widely accessed by Horton Hopkins students – demanded. On his webpage, Petitioner Towles spoke critically of both Petitioner Politte's webpage and the actions of school authorities. Id. However, Petitioner Towles did not stop there. Instead, he proclaimed, "We need to fight this injustice. I call for all Horton Hopkins students to let our school administrators know that we will not tolerate this kind of treatment." Id.

Petitioner Towles' speech differs sharply from the symbolic speech in which the students in Tinker engaged. In striking down the students' suspension in Tinker, this Court spoke approvingly of the district court's finding that "the wearing of armbands . . . was entirely divorced from actually or potentially disruptive conduct by those participating in it." 393 U.S. at 505. Petitioner Towles' webpage calling for students to combat administrative policy is much more analogous to the online student speech at issue in Doninger, wherein "the content of the message itself suggested that [the student blogger's] purpose was to encourage her fellow students to read and respond to the blog." 527 F.3d at 45 (internal citations omitted).

In light of Petitioner Towles' call to arms of the student body, and Principal Smalls' knowledge that Horton Hopkins students were accessing Petitioners' webpages from school during school hours, id., Principal Smalls' foresight that Petitioners' webpages could have resulted in a student protest was reasonable. Such a protest challenging school policy would certainly constitute "substantial disruption of or material interference with school activities," Tinker, 303 U.S. at 514, in and of itself. An additional reasonably foreseeable disruption which Petitioners' webpages could have caused is on-campus tension and fighting between supporters

of Petitioner Politte and those students who sympathized with Petitioner Towles. Furthermore, a protest of the school's policy, or tension and fighting between students, would foreseeably necessitate an administrative response, requiring school administrators, including Principal Smalls, to "be further diverted from their core educational responsibilities," Doninger, 527 F.3d at 51, by the need to clarify the school's search policy or to dissipate student anger.

3. It was reasonably foreseeable that Petitioners' speech would reach Horton Hopkins administrators.

Even if this Court adopts the heightened protection of the "reasonably foreseeable risk of reaching school authorities" requirement, Wisniewski, 494 F.3d at 38, Principal Smalls' regulation of Petitioners' webpages was permissible because it was reasonably foreseeable that Petitioners' off-campus speech would come to the attention of Horton Hopkins school officials. Indeed, that was the goal of Petitioners' speech: Petitioner Towles' webpage explicitly called "for all Horton Hopkins students to let our school administrators know that we will not tolerate this kind of treatment." (R. at 4) The speech put forth on Petitioner Towles' webpage was thus not only likely to reach school authorities, but was *intended* to do so. Petitioner Towles created his webpage in hopes of recruiting other Horton Hopkins students to demonstrate to school officials that they disapproved of the administration's search policy. If Petitioner Towles' webpage was effective, school authorities would be made aware of its existence not unforeseeably, but when Horton Hopkins students reacted as Petitioner Towles demanded.

Furthermore, Petitioner Politte promoted her webpage at the on-campus meeting of a school-sponsored club. (R. at 2) This club has approximately 130 members, all of whom are Horton Hopkins students, and all of whom are among the 198 Horton Hopkins students who are members of Petitioner Politte's online network. Id. Petitioner Politte's webpage ran a reasonably foreseeable risk of coming to the attention of school authorities by virtue of the significant

number of Horton Hopkins students who were aware of Petitioner Politte’s webpage alone. On her webpage, Petitioner Politte posted a photograph of a Horton Hopkins student, which she attributed to an anonymous Horton Hopkins student and captioned “Are Horton Hopkins students becoming drug dealers?” This inflammatory posting – very foreseeably, particularly given Petitioner Politte’s wide audience – caused several parents of Horton Hopkins students to contact Principal Smalls with concerns about drug use. Id. at 3.

Because both Petitioner Towles and Petitioner Politte’s webpages mentioned Horton Hopkins by name, were directed to Horton Hopkins students, and called for action on the part of their audiences, it was reasonably foreseeable that both webpages would come to the attention of school authorities. Accordingly, even under Wisniewski’s foreseeable risk [of coming] to the attention of school authorities” requirement, 494 F.3d at 38, Principal Smalls’ regulation of Petitioners’ webpages was permissible.

4. Respondents’ regulation of Petitioners’ speech was motivated by the desire to maintain order at Horton Hopkins High School.

Should this Court adopt the Second Circuit’s requirement that “the concern for disruption, rather than some other, impermissible motive, was the actual reason for” the regulation of student speech or the punishment imposed, Locurto, 447 F.3d at 179, Tinker indicates that the proper place to look for evidence of administrators’ actual motivation is the trial record. In holding that the suspension of students for wearing black armbands to school was unconstitutional, this Court expressly noted that “the testimony of school authorities at trial indicates that it was not fear of disruption that motivated the regulation prohibiting the armbands; the regulation was directed against ‘the principle of the demonstration’ itself.” Tinker, 393 U.S. at 509 n.3.

Similarly, on remand, the Doninger district court looked to the trial record in evaluating Doninger’s claim that school administrators “punished Ms. Doninger for her speech, not for the potential for disruption.” Doninger, 2009 U.S. Dist. LEXIS 2704, 10. In response to these allegations, the district court “agree[d] with Ms. Doninger that there is evidence in the record – particularly when viewed in the light most favorable to her – that suggests that Ms. Niehoff may have punished Ms. Doninger because [Ms. Doninger’s] blog entry was offensive and uncivil and not because of any potential disruption at school.” Id. at 11. Because there was also evidence that Ms. Niehoff’s actions were motivated by a genuine desire to avoid potential disruption at school, Id., the district court found a question of material fact such that it was unable to grant Ms. Doninger’s motion for summary judgment. Id. at 12.

In contrast to the trial records in Doninger and Tinker, the trial record in the instant case clearly establishes that Principal Smalls’ primary motivation in regulating Petitioners’ webpages was “keeping discipline and order at school, and preventing what she saw as student protest.” (R. at 4) Naturally, Principal Smalls was “angry about Towles’ criticism,” but the reason she regulated Petitioners’ webpages was her “worr[y] that Towles’ and Polite’s websites were causing too much of a disturbance and interrupting other high school students’ education.” Id. Because the trial record shows that Principal Smalls’ actual motivation in regulating Petitioners’ speech was to maintain order and discipline and avoid disruption within the school environment, and because Tinker expressly condones such reasons for regulating student speech, 393 U.S. at 509-14, Principal Smalls’ regulation of Petitioner’s webpages was in compliance with Tinker and the First Amendment.

II. RESPONDENTS’ WARRANTLESS SEARCH OF PETITIONER TOWLES WAS REASONABLE UNDER THE FOURTH AMENDMENT

This court should find that the Horton Hopkins District school officials conducted a reasonable search of Petitioner Towles as set forth in the Fourth Amendment. The Fourth Amendment guarantees the “right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.” U.S. Const. amend. IV. The Fourteenth Amendment extends this protection from unreasonable searches to state officials, which includes public school officials. See Elkins v. United States, 364 U.S. 206, 213 (1960); New Jersey v. T.L.O., 469 U.S. 325, 336 (1985); Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646 (1995). In order to determine the reasonableness of a school search, T.L.O. articulates a two-part test. 469 U.S. 325. Based on the totality of the circumstances, a reasonable search must be 1) justified at its inception and 2) reasonably related in scope to the circumstances which justified the interference in the first place. Id. at 341 (citing Terry v. Ohio, 329 U.S. 1, 20 (1968)). Applying this test, this court should find that the school officials’ actions satisfy both requirements.

A. Independent Evidence That Towles May Have Possessed Drugs Clearly Justified the School’s Search of The Student at Its Inception.

In general, searches must be conducted pursuant to a judicial warrant issued after the government demonstrates probable cause. See, e.g., Almeida-Sanchez v. United States, 413 U.S. 266, 273 (1973). However, this probable cause standard is not required in the context of school searches. A school search is justified at its inception when there are “reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school.” T.L.O., 469 U.S. at 342. This standard of reasonable suspicion does not require probable cause, but only “sufficient probability, not certainty.” See, e.g., C.B. v. Driscoll, 82 F.3d 383, 388 (11th Cir. 1996) (citing T.L.O., 469 at 346). Courts have purposely adopted this standard in order to “spare teachers and school administrators the

necessity of schooling themselves in the niceties of probable cause and permit them to regulate their conduct according to the dictates of reason and common sense.” See T.L.O., 469 U.S. at 343; see also Ornelas v. United States, 517 U.S. 690, 695 (1996) (describing reasonable suspicion as a “commonsense, nontechnical conception[] that deals with the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act”).

Since courts look to the totality of the circumstances in this inquiry, whether or not the school’s suspicion is reasonable depends upon both the content of information and its degree of reliability. Alabama v. White, 496 U.S. 325, 330 (1990) (looking to the totality of the circumstances to determine whether an informant’s tip established the requisite reasonable suspicion to justify the officer’s investigative stop) (citing United States v. Cortez, 449 U.S. 411, 417 (1981)). Under this approach, when the initial suspicion is based solely on a tip, the tip must be sufficiently corroborated to furnish reasonable suspicion that the student has violated the school’s rules. See id. The amount of corroborating evidence depends on the reliability of the tip: “if a tip has a relatively low degree of reliability, more information will be required to establish the requisite quantum of suspicion that would be required if the tip were more reliable.” Id.; see United States v. Gagnon, 373 F.3d 230, 236 (2d Cir. 1990) (asserting courts should “evaluate whether the information an informant provides is corroborated . . . because an informant who is right about some facts is more likely to be right about others”) (citing Illinois v. Gates, 462 U.S. 213, 241-46 (1983)). As a result, uncorroborated tips will not establish reasonable suspicion when the tip is self-exculpatory and “might unload potential punishment on a third party.” Redding v. Safford Unified Sch. Dist. #1, 531 F.3d 1071, 1082-83 (9th Cir. 2008) (finding a

student search unreasonable where the school could not establish a connection between student and the banned pills except for the self-serving statement of a fellow classmate).

Based on the totality of the circumstance presented in this case, this court should reverse the Court of Appeals and find that the school officials' search was justified at its inception because they had reasonable suspicion that Towles possessed drugs. Initially, Principal Smalls learned from multiple sources that a house party hosted by one of her students involved drugs. (R. at 3) Besides numerous phone calls from concerned school parents, Smalls spoke with the Hopkinsville police and learned about the students cited for underage drinking and sophomore Frank Conrad's citation for marijuana possession. Id.

In addition, Smalls viewed the photograph that clearly showed Towles' face with two other students at the house party. While Towles was not smoking in the photograph, he was with Conrad, who was smoking. (R. at 3) While the photograph came from an anonymous source, photographic evidence is inherently more reliable than hearsay. At a minimum, the photograph is more reliable than a self-serving statement seeking to shift blame on particular parties. Most importantly, Principal Smalls did not rely on this photograph alone. Rather, any suspicion that Towles was involved with drugs was justified further by her conversations with parents and the local police. Id. Given the prevalent drug usage on school grounds and the evidence that Towles was present during illegal activity, Principal Smalls only needed to rely on her reason and common sense to reasonably suspect that Towles used drugs at the house party and possessed drugs on campus. (R. at 1, 3)

Based on this suspicion, the school searched four students' lockers and book bags before conducting strip searches. (R. at 3) While the school did not uncover any drugs in Towles' locker or book bag, the school still had reasonable suspicion that Towles could have drugs on his

person at the inception of the strip search. After all four students initially denied possessing drugs, the school discovered marijuana in Conrad's locker. Id. Knowing that Conrad had lied and that Towles did associate with Conrad, school officials reasonably could assume that Towles might be lying also and have drugs on his person.

Finally, the Court of Appeals in this matter incorrectly found that the District Court "certainly should not have considered the marijuana found in Frank Conrad's locker" because the reasonableness inquiry "must only consider facts the school officials knew prior to the start of the search [of any of the students' possessions]." (R. at 11) Rather, the inquiry of whether a search is justified at its inception "must be adjudged according to the circumstances existing at the moment *that particular search began.*" DesRoches v. Caprio, 156 F.3d 571, 577 (4th Cir. 1998) (emphasis added) (finding that a school which had searched nineteen students had conducted not one, but nineteen individual searches). Moreover, courts have found that evidence uncovered in an initial search can justify an extended search. See, e.g., Williams v. Ellington, 936 F.2d 881, 887 (6th Cir. 1991) (finding the school reasonably suspected that a student was concealing contraband on her person when initial questioning of a fellow student implicated in the same investigation uncovered a small vial of "rush"); T.L.O., 469 U.S. at 344-45 (determining that the school official could reasonably suspect marijuana would be in the student's purse when a search for cigarettes uncovered rolling papers). Given these cases, this court should find that the school officials properly considered the marijuana found in Conrad's locker during the initial search in finding reasonable suspicion to justify the later strip search of the students.

B. The Scope of The Search Was Permissible Because a Strong Government Interest Was at Stake And The Methods Employed Were Not Excessively Intrusive.

According to the T.L.O. test, a student search is permissible in scope if “the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction.” 469 U.S. at 342. In other words, courts determine the reasonableness of a search by balancing the “nature of the intrusion on the individual’s privacy against the promotion of legitimate governmental interests.” Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls, 536 U.S. 822, 829 (2002).

While students do not have the same constitutional protections as adults in a nonschool setting, students do not “shed their constitutional rights . . . at the schoolhouse gate.” Tinker v. Des Moines Indep. Cmty. Sch. Dist., 392 U.S. 503, 506 (1969). In particular, courts recognize that students have substantial privacy interests in their bodies. See, e.g., Cornfield v. Consol. High Sch. Dist. No. 230, 991 F.2d 1316, 1321 (7th Cir. 1993) (finding the school’s interest in maintaining order must be weighed against the students’ privacy interests when determining the permissible scope of a search); T.L.O., 469 U.S. at 348 (Powell, J., concurring) (asserting that “children in school – no less than adults – have privacy interests that society is prepared to recognize as legitimate”). A clear example of an obviously impermissible student search where the students’ interests trump those of the school is the “nude search of a student by an administrator or teacher of the opposite sex.” Cornfield, 991 F.2d at 1320.

While recognizing students’ privacy interests, courts have upheld numerous instances of strip searches of students as reasonable in scope. See, e.g., id. at 1323; Williams, 936 F.2d at 887. The permissible scope of the student search is ultimately assessed by the specific facts at hand. The Williams court found the strip search of a female student reasonable in scope given the size of the clear, glass vial sought by the school and the suspected nature of the substance

within the vial. 936 F.2d at 887. The Cornfield court found that a strip search was the “least intrusive way to confirm or deny their suspicions” that the student might be crotching drugs. 991 F.2d at 1323. Even though the sixteen-year-old student was likely “extremely self-conscious” of his body, the court in Cornfield decided that the search was not overly intrusive because the male school personnel conducted the search in a private room without physically touching him or subjecting him to a body search. Id.

In balancing the interests of the students and schools, courts consistently recognize a strong government interest in preventing student drug use. See, e.g., Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 648-49 (1995). Drug use not only affects the student user during a “time when the physical, psychological, and addictive effects . . . are most severe,” but their negative effects extend to “the entire student body and faculty, as the educational process is disrupted.” Id. at 662. As recently as 2002, the Supreme Court declared that the “nationwide drug epidemic makes the war against drugs a pressing concern in every school.” Earls, 536 U.S. at 834.

The matter before this court represents a situation where the school’s interest in curbing drug use and maintaining a productive learning environment trumps the student’s privacy interests. In addition to the drug crisis experienced on the national level, drugs present a very real and immediate threat to the students’ safety in Horton Hopkins High School. Not only did the school suspend twenty-five students for using drugs on school grounds in the last year, but Kelly Smith, while a student at Horton Hopkins, recently died of a cocaine overdose. (R. at 1)

More importantly, school officials did not conduct these strip searches without regard for the students’ privacy interests. Towles’ strip search occurred only after marijuana was found in the locker of a fellow student, causing the school to reasonably suspect that the other students could be concealing drugs on their persons. (R. at 3) Furthermore, the school took pains to

ensure that the searches themselves were conducted in the least intrusive manner possible. Each student was searched individually in a private room by a male teacher. Id. The students kept their undergarments on, and the teacher at no time touched the boys. Id.

III. EVEN IF THIS COURT WERE TO FIND THE SEARCH OF PETITIONER TOWLES UNREASONABLE UNDER THE T.L.O. STANDARD, RESPONDENTS ARE ENTITLED TO QUALIFIED IMMUNITY WITH RESPECT TO TOWLES' FOURTH AMENDMENT CLAIM

The Supreme Court lays out a two-part test for determining qualified immunity in Saucier v. Katz: 1) whether a constitutional right would have been violated on the facts alleged; and 2) if there were a constitutional violation, whether the right was clearly established. 533 U.S. 194, 200 (2001).¹ In order to revoke qualified immunity for the Horton Hopkins officials, this court must find that the search of Towles was unconstitutional and that the unconstitutionality of this search was clearly established in the law at the time of the search.

With regard to the first prong of the Saucier test, Horton Hopkins conducted a constitutionally permissible search. See supra Part II. Were this court to find the search unconstitutional, school officials still enjoy qualified immunity given the lack of clearly established law on this issue.

A. Respondents Are Entitled to Qualified Immunity Because The Constitutionality of Strip Searches Was Not Clearly Established at The Time School Officials Searched Towles.

The case law regarding strip searches is not “clearly established” and does not offer school officials enough guidance to determine whether a strip search will be constitutional. As a result, Respondents are entitled to qualified immunity. See, e.g., Saucier, 533 U.S. 194.

¹ The Supreme Court recently revised this test, specifying that the sequence of the test was no longer mandatory. Rather, judges “should be permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand. Pearson v. Callahan, 172 L. Ed. 2d 565, 576 (2009).

To determine whether a right is clearly established, courts look first to the Supreme Court, and then to circuit court decisions. Beard v. Whitmore Lake Sch. Dist., 402 F.3d 598, 607 (6th Cir. 2005) (citing McBride v. Village of Michiana, 100 F.3d 457, 460 (6th Cir. 1996)). The Supreme Court has adopted a “reasonable person” standard in discerning what is clearly established. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) (looking to the “clearly established statutory or constitutional rights of which a reasonable person would have known”). Moreover, the law must “truly compel (not just suggest or allow or raise a question about), the conclusion . . . that what defendant is doing violates federal law in the circumstances.” Beard, 402 F.3d at 607 (emphasis omitted) (citing Saylor v. Bd. of Educ., 118 F.3d 507, 515-16 (6th Cir. 1997)); see Williams v. Ellington, 936 F.2d 881, 885 (6th Cir. 1991) (asserting that the law “must both point *unmistakably* to the unconstitutionality of the conduct complained of and be so clearly foreshadowed by applicable direct authority as to leave no doubt in the mind of a reasonable officer that his conduct, if challenged on constitutional grounds, would be found wanting”).²

While the Supreme Court has provided some guidance regarding the student search at issue in New Jersey v. T.L.O., 469 U.S. 325 (1985), and Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646 (1995), these cases only “set forth basic principles of law relating to school searches” and fail to provide practical guidance as to “how the factors should be applied in the wide variety of factual circumstances facing school officials today.” Beard, 402 F.3d at 607; see Jenkins by Hall v. Talladega City Bd. of Educ., 115 F.3d 821, 825 (11th Cir. 1997). As a result,

² The courts do not go so far to say that a right is clearly established only when there has already been a previous case that factually mirrors the case at issue. Redding v. Safford Unified Sch. Dist. #1, 531 F.3d 1071, 1087 (9th Cir. 2008) (citing Drummond ex rel. Drummond v. City of Anaheim, 343 F.3d 1052, 1060-61 (9th Cir. 2003)). Rather, a right may be clearly established “as long as the unlawfulness was apparent in light of existing law.” Id.

school officials, from Supreme Court precedent alone, cannot judge with any degree of certainty whether a strip search will be constitutional.

Looking to the circuit courts, school officials will currently find conflicting law on strip searches. Four circuits have found strip searches constitutional in certain circumstances.

Williams, 936 F.2d 881; Cornfield v. Consol. High Sch. Dist. No. 230, 991 F.2d 1316 (7th Cir. 1993); Hedges v. Musco, 204 F.3d 109 (3d Cir. 2000); Bridgman v. New Trier High Sch. Dist. No. 203, 128 F.3d 1146 (7th Cir. 1991). Certain strip searches have been declared unconstitutional in other circuits. Phaneuf v. Fraikin, 448 F.3d 591 (2d Cir. 2006); S.C. v. Connecticut, 328 F.3d 225 (2d Cir. 2004); Beard, 402 F.3d 598.

Part of the difficulty in finding clearly established law regarding strip searches lies in the fact that “strip search” is an umbrella term that describes a range of circumstances. Several circuits have recognized the removal of some, and not necessarily all, of a person’s clothing to be a strip search. See, e.g., Redding, 531 F.3d at 1080; Justice v. City of Peachtree City, 961 F.2d 188, 190 (11th Cir. 1992); Amaechi v. West, 237 F.3d 356, 363 (4th Cir. 2001); Wood v. Hancock County Sheriff’s Dep’t, 354 F.3d 57 (1st Cir. 2003). Within this broad category, courts will consider the strip search that entails the removal of all clothing as necessarily more intrusive than a strip search entailing the removal of only some clothing. Unfortunately, this broad category of strip searches and the balancing approach adopted by courts in assessing the permissible scope of a given search require the courts to conduct very fact-specific inquiries. The resulting precedent on school searches thus provides few predictive rules.

B. Giving Qualified Immunity to The Horton Hopkins School Officials is Necessary so That They Can Effectively Execute Their Responsibilities as Public Educators.

The doctrine of qualified immunity is driven by two mutually dependent policy considerations: “1) the injustice, particularly in the absence of bad faith, of subjecting to liability

an officer who is required, by the legal obligations of his position, to exercise discretion; [and] 2) the danger that the threat of such liability would deter his willingness to execute his office with the decisiveness and the judgment required by the public good.” Scheuer v. Rhodes, 416 U.S. 232, 240 (1974). Implicit in the idea that officials have some immunity is a recognition that they may err. The concept of immunity assumes this and proceeds on the basis that “it is better to risk some error and possible injury from such error than not to decide or act at all.” Id. at 242.

Particularly with regard to schools, questioning “every decision with the benefit of hindsight would undermine the authority necessary to ensure the safety and order of our schools.” Williams, 936 F.2d at 886. Even if this court were to determine that this search exceeded constitutional bounds, Horton Hopkins school officials did not abuse their discretionary authority in bad faith. The gym teacher who searched Towles took measures to minimize his intrusion on Towles’ privacy by conducting the search privately and not having any actual contact with the student. (R. at 3) The doctrine of qualified immunity seeks to protect exactly such behavior by not imposing liability on those who must make uncertain decisions in order to serve the public good.

CONCLUSION

For the aforementioned reasons, Respondents Keena Smalls and Horton Hopkins School District respectfully ask the Court to affirm the State of Grace Court of Appeals’ decisions that Respondents permissibly regulated Petitioners’ student speech and that Respondents are entitled to qualified immunity with respect to Petitioner Towles’ Fourth Amendment claim, and to reverse the State of Grace Court of Appeals’ decision that the search of Petitioner Towles was unreasonable.

Respectfully submitted,
ATTORNEYS FOR RESPONDENTS